

1
2
3
4
5
6
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

7
8
9
10 ANDRE RIDER, No. CIV S-04-1809-GEB-CMK-P

11 Petitioner,

12 vs.

ORDER

13 S. KERNAN,

14 Respondent.

15 _____ /
16 Petitioner, a state prisoner proceeding pro se, brings this petition for a writ of
17 habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States
18 Magistrate Judge pursuant to Local Rule 72-302(c)(21).

19 On February 7, 2006, the magistrate judge filed findings and recommendations
20 herein which were served on petitioner and which contained notice to petitioner that any
21 objections to the findings and recommendations were to be filed within ten days. Petitioner has
22 not filed objections to the findings and recommendations.

23 The court has reviewed the file and finds the findings and recommendations to be
24 supported by the record and by the magistrate judge's analysis. The findings and
25 recommendations will, therefore, be adopted in full. Petitioner's request for an order staying the
26 instant proceedings and holding consideration of his claims in abeyance pending exhaustion of

1 state remedies (“stay-and-abeyance order”) will be denied.

2 The court now addresses respondent’s motion to dismiss (Doc. 9), filed on July
3 21, 2005. Respondent correctly notes that the petition contains both exhausted and unexhausted
4 claims and must be dismissed. See Rose v. Lundy, 455 U.S. 509, 520 (1982). Given that the
5 court agrees with the magistrate judge’s recommendation that petitioner is not entitled to a stay-
6 and-abeyance order, the court also agrees that the instant petition must be dismissed.
7 Respondent’s motion to dismiss will, therefore, be granted.

8 This dismissal, however, will be with leave to file an amended petition which
9 alleges only exhausted claims. Petitioner is cautioned that, if he does not file an amended
10 petition within the time provided herein which contains only exhausted claims, the entire petition
11 will be dismissed, without prejudice, for failure to exhaust state court remedies. See id.

12 Accordingly, IT IS HEREBY ORDERED that:

13 1. The findings and recommendations filed February 7, 2006, are adopted in
14 full;

15 2. Petitioner’s motion for a stay-and-abeyance order is denied;

16 3. This action proceeds on the petition filed on August 30, 2004, which is a
17 “mixed” petition containing both exhausted and unexhausted claims; and

18 4. Respondent’s motion to dismiss (Doc. 9) is granted;

19 5. The petition filed on August 30, 2004, is dismissed with leave to file an
20 amended petition which alleges only exhausted claims; and

21 6. Petitioner shall file an amended petition within 30 days of the date of
22 service of this order.

23 Dated: March 21, 2006

24 /s/ Garland E. Burrell, Jr.
25 GARLAND E. BURRELL, JR.
26 United States District Judge